



Kitsap County Hearing Examiner

COUNTY COURTHOUSE, 614 DIVISION STREET MS-36
http://www.kitsapgov.com/dcd/lu_env/he/

PORT ORCHARD WASHINGTON 98366-4682
(360) 337-7181 FAX (360) 337-4925
kashcraf@co.kitsap.wa.us

NOTICE OF HEARING EXAMINER RECONSIDERATION DECISION

September 16, 2009

To: Interested Parties and Parties of Record

RE: Project Name: **Ramirez Landscape Business**
Applicant: **Efrain Ramirez**
5206 See Forever Lane
Poulsbo, WA 98370
North Kitsap County, Commissioner District #1
Application: **Conditional Use Permit**
Case Number: **090226-007 (082602-2-045-2009) LIS#08 58587**

Enclosed is the Reconsideration Decision issued by the Kitsap County Hearing Examiner in the above-referenced matter.

THE DECISION OF THE HEARING EXAMINER IS FINAL, UNLESS APPEALED TO THE KITSAP COUNTY BOARD OF COMMISSIONERS, AS PROVIDED BY SECTION 120 OF THE KITSAP COUNTY LAND USE AND DEVELOPMENT PROCEDURES. ANY APPEAL MUST BE FILED ON OR BEFORE THE CLOSE OF BUSINESS ON SEPTEMBER 30, 2009.

Pursuant to the Kitsap County Land Use and Development Procedures, (KCC 21.04.120) an appeal may be filed objecting to the Hearing Examiner's Decision. An appeal must be made in writing, and filed with both the Department of Community Development (DCD) and the Board of County Commissioners (BCC) offices. At the time of filing the appeal, the appellant shall pay the sum of **five hundred dollars (\$500.00)**. This fee is non-refundable and subject to change. Make check payable to Kitsap County Department of Community Development (DCD).

The written appeal shall be made on or attached to an appeal form provided by DCD, and shall contain the following information.

1. The project name, project applicant, application type, and case number designated by the County:
2. The name, address, and signature of each appellant. If multiple parties file a single appeal, the appeal document shall designate, in writing, one party as the contract representative for all contact with the DCD Director and BCC. All contact between the County and the appellants regarding the appeal,
3. A written statement of the specific aspects(s) of the Decision and/or SEPA determination being appealed, the reasons why each is in error as a matter of fact or law, and the evidence relied upon to prove the error

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.The complete case file will be available for review at the Department of Community Development, Monday through Thursday, except holidays, 10:00 a.m. to 3:45 p.m. by calling me at (360) 337-4487 for an appointment.

If you have questions, please contact me at (360) 337-4487. If you have procedural questions regarding the appeal hearing before the Board of County Commissioners, please contact the Clerk of the Board at (360) 337-7146.

Sincerely,



Karen Ashcraft
Clerk of the Examiner

- C Efrain Ramirez, 5206 See Forever LN, Poulsbo, WA 98370
- Jeff Brown, PE, Whiteley Engineering Inc., 1015 NE Hostmark ST, Suite 102, Poulsbo, WA 98370, jbrown@whiteley.us
- : Thornton P Percival, 18478 Angeline AVE NE, Suquamish, WA 98392, tpplaw@embarqmail.com

Interested Parties:

- Robert & Nancy Ballew seeforeverfarm@aol.com
- Edward C Teather, 5278 NE See Forever LN, Poulsbo, WA 98370
- JR Collier JR, jrc2p@aol.com
- Nicholas L Wallace, schultab@bentonrea.com
- On A Clear Homeowners Association, jrc2p@aol.com
- Mike O'Connor, mike.team4@earthlink.net
- Gerald Kearney, gerry@kitsapattorney.com
- Donald R Edwards, schoolhousesalon@gmail.com

SEP 14 2009

BEFORE THE KITSAP COUNTY
HEARING EXAMINER

KITSAP CC
COMMUNITY DEVELOPMENT

In the Matter of the Remand of the)	No. 090226-007
Application of)	
)	Ramirez Landscape
Efrain Ramirez)	Business
)	
)	DECISION UPON
)	REQUEST FOR
<u>For Approval of a Conditional Use Permit</u>)	RECONSIDERATION

**SUMMARY OF DECISION
UPON REQUEST FOR RECONSIDERATION**

In response to the Applicant’s request for reconsideration of the Hearing Examiner’s Decision Upon Remand, which provided further clarification concerning Conditions 12 and 15, as requested by the Kitsap County Board of County Commissioners, the request for reconsideration is **DENIED**. Applicant’s request for reconsideration of the Hearing Examiner’s Decision Upon Remand as to Condition 28 is **GRANTED**.

PROCEDURAL BACKGROUND

This matter involves a request for a conditional use permit to continue operating a contractor’s storage yard on property located at 5206 See Forever Lane in Kitsap County, Washington. As the result of a code violation investigation in 2006, County staff determined that the Applicant was operating a contractor’s storage yard on the property subject to the request without proper land use approval. On March 12, 2008, the County code enforcement officer issued a citation for violation of Kitsap County Code (KCC) 17.430.020, operating a landscape business in a residential zone without land use approval. The Applicant chose to apply for a Conditional Use Permit (CUP) to legalize the operation, rather than cease the activity on the subject property. The request also includes construction of a 3,600 square foot building to store heavy equipment vehicles, including flatbed trucks, dump trucks, excavators, front-end loaders, tractors and trailers, mowers and other miscellaneous small landscaping equipment on the property. The Applicant also requested an outside parking area for employees and an outside storage area measuring 600 square feet, for heavy vehicle parking, as well as a 200 square foot outside storage area for surplus landscape materials.

The Kitsap County Hearing Examiner held an open record hearing on February 26, 2009 and on March 12, 2009, during which the Hearing Examiner admitted exhibits and heard sworn testimony. The Hearing Examiner issued a decision on March 23, 2009 approving the CUP request, subject to 36 conditions of approval.

On April 14, 2009, the Applicant filed a timely appeal of the Hearing Examiner’s decision, challenging four conditions imposed by the Hearing Examiner. The Kitsap

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County Board of County Commissioners (BOCC) conducted a closed record appeal hearing on June 22, 2009. At the closed record appeal hearing, the appellant's attorney presented oral argument and provided photographs to the BOCC. The appellant's attorney stated the photographs depicted the subject property. The photographs were not admitted as exhibits by the Hearing Examiner during the open record hearing, and thus were not part of the record upon which the Hearing Examiner's decision was based.

On July 13, 2009, the BOCC remanded the matter to the Hearing Examiner for further clarification of Conditions 12, 15, and 28. The Hearing Examiner issued a Decision Upon Remand clarifying Conditions 12, 15, and 28, and revising Condition 12, dated August 7, 2009. Based on sworn testimony and exhibits in the record, the Hearing Examiner revised Condition 12 to allow the Applicant and other users of an easement to reach agreement on the scope of the easement or to seek a judicial determination of easement scope. The Applicant submitted a Request for Reconsideration of the Decision Upon Remand on August 31, 2009.¹

REQUEST FOR RECONSIDERATION

In his request for reconsideration, the Applicant argues that the Hearing Examiner revision to Condition 12 is erroneous because "the road easement and maintenance agreement are clear and unambiguous" and "the decision on remand is beyond the scope of the Hearing Examiners [sic] jurisdiction." The Applicant also argues that "there is no evidence in the original record that the private roadway easement does not currently meet all requirements of the Fire Marshal," and suggests the hearing on the application be reopened to determine the necessity for Condition 15. Finally, the Applicant argues that Condition 28 is "unsupported by the facts and findings and would thus be arbitrary and capricious." *Appellant's Request for Reconsideration on Remand to the Hearing Examiner, August 31, 2009, at 2.*

RESPONSE TO REQUEST FOR RECONSIDERATION

The Applicant argues that the scope of the 50-foot wide private easement providing the only access from Port Gamble Road NE to the Applicant's property is clear and unambiguous, and that the Hearing Examiner's decision to revise Condition 12 to require

¹ Upon remand, Rule 1.9.1 of the Kitsap County Office of the Hearing Examiner Rules of Procedure, adopted by the Kitsap County Board of County Commissioners (BOCC) on June 22, 2009, states that a party may file a motion for Request for Reconsideration within five business days of the Hearing Examiner's decision. *Kitsap County Office of the Hearing Examiner Rules of Procedure, Rule 1.9.1.* An email message from the Applicant's attorney to Meg Sands, County Planner, dated August 25, 2009, states that the Applicant did not receive the Hearing Examiner's decision, dated August 7, 2009, from the County Department of Community Development (DCD) until August 24, 2009. The email message also states that the Hearing Examiner Decision Upon Remand was not posted on the County DCD website prior to receipt. An August 26, 2009 email message from Meg Sands, County Planner, extended the date to file a reconsideration request with Kitsap County until August 31, 2009. The Hearing Examiner received copies of the August 25, 2009 and August 26, 2009 email messages from the County DCD with the Applicant's reconsideration request on September 1, 2009.

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the Applicant submit evidence that all parties to the easement have agreed on the scope of the easement or evidence that the Applicant has sought judicial determination of the scope of the easement is beyond the authority of the Hearing Examiner. Thus, the Applicant alleges that Condition 12, as revised, constitutes an error of law.

The Applicant's argument supports the Hearing Examiner's conclusion in the Decision Upon Remand that "the scope of the easement at issue has a direct bearing on whether the Applicant can meet his burden to show the proposed use would not be materially detrimental to uses or property in the immediate vicinity." *See Decision Upon Remand, August 7, 2009, at 2.* However, sworn testimony and exhibits in the record show that the scope of the easement is controversial among those with the right to use the easement. The Applicant argues that the easement does not prohibit access for commercial purposes, and intends to continue use of the easement for his existing landscaping business. *See Decision Upon Remand, Findings 12, 14, 16, and 17.* Robert and Nancy Ballew also own the property encumbered by the easement, and disagree that the uses allowed under the easement include the Applicant's use of the easement to transport heavy equipment associated with the proposed contractor's storage yard over the road within the easement. E.C. Teather, a neighboring property owner, also expressed concern that commercial use of NE See Forever Lane is inconsistent with the road agreement governing the road. *See Decision Upon Remand, Findings 34 and 37.* Thus, sworn testimony and exhibits in the record demonstrate that adjudication of the scope of the easement is necessary for the Applicant to show the proposed use would not be materially detrimental to uses or property in the immediate vicinity, as is required to approve a conditional use permit request under Kitsap County Code (KCC) 17.421.030.

The Hearing Examiner's jurisdiction to hear and decide matters in Kitsap County is strictly limited to the jurisdiction conveyed by the legislative body in Kitsap County,² and does not extend to deciding the scope of an easement. Indeed, the Applicant's Request for Reconsideration identifies no Kitsap County ordinance granting the Hearing Examiner authority to adjudicate the scope of an easement in controversy. Absent agreement by those with the right to use the easement, the scope of an easement is properly determined by a court. In deciding the scope of the easement at issue, a court may consider the following relevant facts, as illustrated by the Applicant's argument in his reconsideration request: the language of the easement;³ use of other properties benefited by the easement, according to sworn testimony and exhibits in the record; the

² *See* RCW 36.70.970 ("the legislative authority may vest in a hearing examiner the power to hear and decide those issues it believes should be reviewed and decided by a hearing examiner"). *Cf. Chausee v. Snohomish County Council*, 38 Wn.App. 630, 636 (1984) ("The statutory provisions governing the Council's authority do not bestow upon the Council the general jurisdiction to consider all legal and equitable issues") (citing RCW 36.70.970).

³ Exhibit 39 notes that a boundary line adjustment apparently landlocked the Ramirez parcel. Whether the boundary line adjustment was recorded before or after the grant of the easement is not stated but may affect the scope of the easement. *Exhibit 39.*

grantor's intent in granting the easement; the language of recorded Covenants, Conditions and Restrictions from the See Forever Development; and the language of recorded Road Maintenance Agreement. *See Appellant's Request for Reconsideration, at 2.* Because the Kitsap County code grants the Hearing Examiner no authority to adjudicate the controversy over the scope of the easement, but does grant the Hearing Examiner authority to condition the use to assure compatibility with the purpose of KCC Title 17 with respect to the proposed use on the particular site, other existing and potential uses, and the general area of the proposed use,⁴ Condition 12, as revised, is proper and lawful. Thus, the request for reconsideration of Condition 12 is denied.

The Applicant also argues that there is no evidence in the record that the private roadway easement does not currently meet Kitsap County Fire Marshal requirements, and thus alleges that Condition 15 is an error of fact and law. During the open record hearing, Applicant presented no evidence that the easement does meet the Fire Marshal requirements. The Decision Upon Remand cites County DCD staff's recommendation to approve the proposed use subject to 30 conditions of approval, including conditions to ensure adequate fire protection required by the Kitsap County Fire Marshal. The Applicant testified that he read and understood proposed conditions of approval with no objections, including the Fire Marshal's requirement that fire apparatus access roads exist to access the proposed use and that such roads are maintained and cannot be altered without approval of the Fire Marshal's office. *See Decision Upon Remand, Finding 44.* Given the Applicant's sworn testimony, Condition 15 upon remand is necessary to ensure that the Road Maintenance Agreement governing the easement is consistent with Fire Marshal requirements.

While the Hearing Examiner may reopen a hearing to receive further evidence prior to the filing of a final decision, ultimately the Applicant bears the burden to provide evidence to show a proposed use will comply with Kitsap County Code. In this case, the evidence in the record shows that the roadway within the easement is subject to a Road Maintenance Agreement, to which Applicant is but one of several parties. Thus, the Applicant does not have exclusive responsibility for road maintenance or exclusive control over the roadway. However, the Applicant did not proffer sworn testimony or exhibits at the open record hearing that the other parties to the Road Maintenance Agreement would maintain the easement in compliance with Fire Marshal requirements. Thus, a condition of CUP approval ensuring that the other parties to the Road Maintenance Agreement governing the easement will maintain the easement in compliance with Fire Marshal requirements is necessary for the Applicant to comply with

⁴ KCC 17.421.030 grants the Hearing Examiner authority to condition a proposed use to "[a]ssure that the degree of compatibility with the purpose of this title shall be maintained with respect to the particular use on the particular site and in consideration of other existing and potential uses, within the general area in which the use is proposed to be located." *KCC 17.421.030.*

Title 17 of the Kitsap County Code.⁵ As such, Condition 15 is proper and lawful, and the request for reconsideration of Condition 15 is denied.

Finally, the Applicant argues that Condition 28 is unsupported by the facts and findings, and thus alleges an error of fact and law. As stated in the Decision Upon Remand, Findings 17, 18, 22, and 34-40 of the Decision contain citations to sworn testimony and exhibits in the record relevant to the analysis for this condition. Notwithstanding this statement of the issue in his Request For Reconsideration, Applicant concedes that “(these findings) offer some support... “for Condition 28, stating that “the concerns expressed require a fence” but asserts for the first time that a more limited fence would serve the purpose. *See Appellant’s Request For Reconsideration, pp.5-6.* However, the Applicant asserts for the first time following the close of the record that a more limited fence would address the concerns raised. The Applicant’s assertion departs from the Applicant’s position to date that no fence is required. The Hearing Examiner is persuaded by this new argument and agrees that a revised condition can adequately address the safety, noise, and visual concerns expressed at the open record hearing, and can ensure the proposal is compatible with property in the immediate vicinity.

DECISION

Condition 12, as revised, and Condition 15 of the Hearing Examiner’s Decision Upon Remand are based upon the authority given the Hearing Examiner by the Kitsap County Board of County Commissioners and on exhibits and sworn testimony in the record, the request for reconsideration must be **DENIED**.

The Request For Reconsideration as to Condition 28 is **GRANTED** and the original Conditions of Approval are amended as follows:

1. Construction plans and profiles for all roads, storm drainage facilities and appurtenances prepared by the developer’s engineer shall be submitted to Kitsap County for review and acceptance. No construction shall be started prior to said plan acceptance.
2. The information provided demonstrates this proposal is a *Major Development* as defined in Kitsap County Code Title 12, and as such will require a Site Development Activity Permit (SDAP) from Development Engineering.
3. Stormwater quantity control, quality treatment, and erosion and sedimentation control shall be designed in accordance with Kitsap County Code Title 12 or as amended at the time of SDAP application. The submittal documents shall be prepared by a civil engineer licensed in the State of Washington. The fees and submittal requirements shall be in accordance with Kitsap County Ordinances in effect at the time of SDAP application.

⁵ The Hearing Examiner may approve a conditional use permit request or approve with conditions may be granted only when all of the KCC 17.421.030 criteria are met. One of the criteria is that the proposal complies with KCC Title 17 applicable requirements. *KCC 17.421.030.*

4. The water quality BMP shall be sized to provide treatment of the post-developed peak flow rate from the 6-month, 24-hour storm event per the KCSDM Section 6.2.
5. The site plan indicates that greater than 1 acre will be disturbed during construction. This threshold requires a National Pollutant Discharge Elimination System (NPDES) Stormwater Construction permit from the State Department of Ecology. More information about this permit can be found at: <http://www.ecy.wa.gov/programs/wq/stormwater/construction/> or by calling Charles Gilman at (360) 407-7451, email chgi461@ecy.wa.gov. This permit is required prior to issuance of the SDAP.
6. The infiltration facilities shall remain off line until the drainage areas are stabilized and the water quality treatment facility is adequately established. Temporary erosion and sedimentation ponds shall not be located over infiltration facilities. During the construction of the proposed infiltration facilities, the Project Engineer shall provide an inspection to verify that the facilities are installed in accordance with the design documents and that actual soil conditions encountered meet the design assumptions. The Project Engineer shall submit the inspection report properly stamped and sealed with a professional engineer's stamp to Development Engineering.
7. The owner shall be responsible for maintenance of the storm drainage facilities for this development following construction. Before issuance of Occupancy Permits for this development, the person or persons holding title to the subject property for which the storm drainage facilities were required shall record a Declaration of Covenant that guarantees the County that the system will be properly maintained. Wording must be included in the covenant that will allow the County to inspect the system and perform the necessary maintenance in the event the system is not performing properly. This would be done only after notifying the owner and giving him a reasonable time to do the necessary work. Should County forces be required to do the work, the owner will be billed the maximum amount allowed by law.
8. Kitsap County will not be responsible for any damage to any private roads, tracts, and/or easement areas that may occur during routine maintenance activities and that in Kitsap County's judgment occur, in whole or in part, because of any construction materials or techniques, or any maintenance materials or techniques. This includes, but is not limited to, damage to pavement or vegetated areas caused by maintenance trucks.
9. The impervious area accounted for in the overall drainage facilities installed shall be indicated on the face of the final design. Additional impervious surfaces beyond the amount accounted for in the overall drainage facilities shall be mitigated in accordance with Kitsap County Code Title 12.
10. At Building Permit application, submit (KCPW Form 1601) for issuance of a Concurrency Certificate, as required by KCC Section 20.04.030 Transportation Concurrency.

11. All rights of access for adjoining properties currently in existence shall be preserved. Any amendment to the existing easement rights of adjoining property owners shall be properly executed and recorded prior to SDAP or final plat acceptance.
- ~~12. Applicant shall obtain a license from the owner of the property burdened by the easement to use NE See Forever Lane to move his heavy equipment and vehicles from the subject property and to use NE See Forever Lane as an emergency vehicle access.~~
12. The Applicant shall submit to the County an agreement of all parties to the easement as to the scope of the easement within 30 days from the date of the decision on remand. The agreement shall provide that the Applicant may use NE See Forever Road to move heavy equipment, that NE See Forever Road is usable as an emergency access road for the Applicant's home and business, and that the NE See Forever Road shall be maintained, by common agreement, to the Kitsap County Fire Marshal's standards. Alternatively, Applicant may submit evidence that he is seeking a judicial determination of the scope of the easement.

If the Applicant cannot demonstrate by agreement or judicial determination that he has the right to move heavy equipment over NE See Forever Lane, the Hearing Examiner concludes that the use would be materially detrimental to uses or properties in the immediate vicinity and that the contractor's storage yard use should cease.

13. Prior to SDAP approval, Waste Management (360) 674-3166 shall be contacted for information on implementing the solid waste/recycling storage requirements influenced by the service provider (e.g. dumpster size and location) for the project. Pay particular attention to the access requirements of collection trucks. Provide documentation from the solid waste/recycling service provider that their requirements for this project have been met. Applicant shall not burn onsite any waste generated by his business.
14. The SDAP submittal shall show that at least 150 square feet of exterior recyclable materials storage space for the project. Describe collection containers and show their locations, method for securing the enclosure gates in an open position and pad dimensions on the civil plans submitted for approval. Details of the enclosure, including interior dimensions, building materials and lighting must be included with the civil plans prior to final approval. These details may be architectural drawings attached to the civil plans.
15. Fire apparatus access roads are required and must be maintained. Any proposed revision to these roads must be submitted to, reviewed and approved by the Kitsap County Fire Marshal's Office. As a condition of approval, Applicant shall obtain written agreement from the other parties to the Road Maintenance Agreement that they will comply with the Fire Marshal's conditions herein and all requirements of the Kitsap County Fire Marshal.
16. If an electronic gate is installed a Knox over ride system is required to be installed for fire department access.

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17. The recipient of any conditional use permit shall file a land use binder with the county auditor prior to any of the following: initiation of any further site work, issuance of any development/construction permits by the county, or occupancy/use of the subject property or buildings thereon for the use or activity authorized. The binder shall serve both as an acknowledgment of and agreement to abide by the terms and conditions of the conditional use permit and as a notice to prospective purchasers of the existence of the permit. The binder shall be reviewed and approved by the Department of Community Development prior to recording.
18. The contractor's storage yard shall be accessory to the operator's primary residence.
19. The storage or parking of heavy equipment vehicles and heavy construction equipment on the subject property used in the Applicant's business is limited to a combined total of not more than ten.
20. Outside business-related storage is limited to the areas proposed on the site plan (Exhibit 50).
21. All outdoor storage areas shall be fenced or walled to contain the materials or items being stored.
22. All required permits shall be obtained prior to construction and/or occupancy.
23. All building permits shall be subject to impact fees pursuant to the *Kitsap County Code* in effect on the date of a complete building permit application.
24. Occasional equipment maintenance may be performed on site. No maintenance involving fluids (oils, transmission, hydraulics, etc.) shall take place on the subject property.
25. Applicant shall store no hazardous substances onsite. Applicant may store no more than two fifty pound bags of fertilizer onsite and shall not store pesticides or herbicides in any amount onsite.
26. The proposed use shall comply with all restrictions at Kitsap County Code Table 19.600.620, Activities With A Potential Threat to Groundwater.
27. No parking is permitted within the required 50-foot front yard setback.
- ~~28. The perimeter of the subject property will be fenced by six-foot high solid cedar fencing. A gate will be placed across the driveway.~~
28. The entire perimeter of the principal business area of subject property that will be used for storage associated with the landscaping business shall be fenced by six-foot high solid cedar fencing. The fenced area shall include the parking area and the portion of the business area adjacent to See Forever Lane. A gate shall be placed across the driveway.
29. The applicant shall provide additional landscaping within 90 days of the issuance of the Conditional Use Permit. The additional landscaping shall be installed as described below:

- a. A 25-foot to 50-foot rural character buffer shall be provided around the perimeter. The buffer shall be planted with 4 foot conifers on ten foot centers staggered in two rows. Enhancement along a portion of the north, east and south property lines with both evergreen trees and shrubs shall be planted to provide the required functional screening.
 - b. The landscape plants shall be maintained to ensure that they remain viable and will provide a functional screening of the site as soon as possible.
30. Artificial outdoor lighting shall be arranged so that the lighting is fully recessed or fully shielded from side view and directed downward and away from adjoining properties. No more than one-foot candle of illumination shall leave the project property boundaries.
 31. No outdoor speakers or other music amplification devices shall be used in the conduct of applicant's business on the subject property.
 32. Applicant may not use any of the water provided by On A Clear Day Water System for any business purposes, including but not limited to washing of vehicles and filling containers for plant watering. Applicant shall not permit his employees to use the restroom in the residence.
 33. Applicant shall obtain any additional permits necessary under Kitsap County Code to operate a business from his home.
 34. The uses of the subject property are limited to the uses proposed by the applicant and any other uses will be subject to further review pursuant to the requirements of the KCC. Unless in conflict with the conditions stated above and/or any regulations, all terms and specifications of the application shall be binding conditions of approval. Approval of this project shall not, and is not, to be construed as approval for more extensive or other utilization of the subject property.
 35. The applicant shall not employ more than 4 additional people in the operation of his business at this location, for a total of 5 employees including the applicant. Hours of operation shall be limited to between 7 am and 7 pm Monday through Friday.
 36. Any violation of the conditions of approval shall be grounds to initiate revocation of this Conditional Use Permit..

Decided this 8th day of September 2009.



KIMBERLY A. ALLEN
Hearing Examiner

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